Supreme Court, U.S.
FILED
FEB 24 1993
OFFICE OF THE CLERK

No. 92-6033

In The

Supreme Court of the United States

October Term, 1992

WILLIAM MCNEIL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

ALLEN E. SHOENBERGER
Loyola Law School
One East Pearson
Chicago, Illinois 60611
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Department of Justice
Washington, D.C. 20530
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Petition For Certiorari Filed September 21, 1992
Certiorari Granted January 15, 1993

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RELEVANT DOCKET ENTRIES

United States District Court,
Northern District of Illinois

3/9/89	Received 03/06/89: Complaint and four copies Filed 03/06/89: Application to proceed in forma pauperis, supporting documentation.
	Forwarded 03/09/89 to Judge Alesia: entire case file.
06/13/89	Minute order of 6/12/89: Ruling on plaintiff's motion for leave to file in forma pauperis is held in abeyance pending further order of court. Alesia, J.
8/25/89	Filed 8/19/89: Plaintiff's affidavit in support of motion for appointment of counsel; (Attachments)
4/25/90	Filed 5/15/90: Copy of receipt for payment of filing fee. (Temporarily unavailable for docketing.)
4/24/90	Minute order of 4/20/90. Plaintiff's motion for leave to file in forma paureris (sic) is denied as moot since (sic) has paid the filing fee. The Clerk is directed to issue summons for service of the complaint upon defendant. Pursuant to Rule 4(c)(2)(B)(iii) of the Federal Rules of Civil Procedure, the court orders the United States Marshal to effect service in this action. Service by a United States Marshal is necessary because plaintiff is incarcerated and proceeding pro se. The Clerk is directed to send a copy of this order to the United States Marshal.

Filed 5/15/90: Complaint.

8/7/90 Filed 8/6/90: U.S. Marshal's return of service of summons and complaint executed as to the U.S. Department of Health and Human Services on 7/30/90.

8/29/90 Filed 8/28/90: Defendant's ANSWER.

9/20/90 Filed 9/19/90: Defendant's motion to dismiss. Plaintiff's (sic) memorandum in support of defendant's motion to dismiss.

10/9/90 Memorandum in opposition by plaintiff to the defendant's motion to dismiss (Attachments).

10/30/90 REPLY MEMORANDUM of Defendant in support of motion to dismiss.

1/24/91 ENTERED JUDGMENT; The court finds that it lacks subject matter jurisdiction over this action. The defendant United States Public Health Service's motion to dismiss is granted. . . .

2/5/91 NOTICE OF APPEAL by Plaintiff William McNeil.

2/22/91 Motion by Plaintiff for leave to file an appeal in forma pauperis (Attachments)

3/13/91 MINUTE ORDER of 3/13/91 before Honorable James H. Alesia: The court grants plaintiff's motion for leave to appeal in forma pauperis.

7/6/92 CERTIFIED COPY of order from the USCA for the 7th Circuit entered 5/20/92: It is ordered and adjudged by this court that the judgment of the District Court is affirmed, with costs, in accordance with the decision of this court.

IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM MC' NEIL
PLAINTIFF
-VS-
THE UNITED STATES
PUBLIC HEALTH SERVICE
DEFENDANTS

CIVIL ACTION
89C1822
Filed
March 9, 1989

STRICT TORT LIABILITY

1. THE PLAINTIFF WILLIAM MC'NEIL (PRO. SE.) AND MOVES THIS HONORABLE COURT UNDER LIABILITY OF THIS UNITED STATES FEDERAL TORT CLAIM ACTS 1346, 2671, 2680, FOR THE DAMAGES CAUSED BY SAID DEFENDANTS CONDUCTING HUMAN RESEARCH AND EXPERIMENTATION ON PRISONERS WITHIN THE ILLINOIS DEPARTMENT OF CORRECTION WITHOUT THE PLAINTIFF (INFORMED CONSENT) WHO IS A FORCED SUBJECT IN SAID EXPERIMENTS ON THE SPREAD OF INFECTIOUS DISEASES, THE PLAINTIFF WILLIAM MC' NEIL IS A PRISONER AT THE STATEVILLE CORRECTIONAL CENTER LOCATED IN THE IN THE [sic] STATE OF ILLINOIS.

THE DEFENDANTS UNITED PUBLIC HEALTH SERVICE, THIS GOVERNMENTAL AGENCY WAS ORGANIZED AND EXIST PURSUANT TO LAWS INACTED [sic] BY THE UNITED STATES CONGRESS, WITH THE PRINCIPLE PLACE OF BUSINESS AT THE GENERAL

COUNSEL OFFICE, FOOD& DRUG DIVISION, ROCKVILLE MD. 20855 CHIEF COUNSEL THOMAS SCARLETT NO.F 88-35196.

THE DEFENDANTS ARE FULLY AWARE OF THE STAKES IN PRISON RESEARCH ARE HIGH WITH THE DEFENDANTS ACCESS TO PRISON, CAN OBTAIN HEALTHY HUMANS SUBJECTS LIVING IN TOTAL CONTROLLED CONDITIONS THAT ARE DIFFICULT IF NOT IMPOSSIBLE TO DUPLICATE ELSEWHERE.

IN ADDITION THE STAFF IS FORCING KNOWN AIDS CARRIERS TO CELL WITH OTHER INMATES. THE DEFENDANTS ARE CONDUCTING EXPERIMENTS ON PRISONERS THAT WOULD NOT BE SANCTIONED FOR ANY PRICE BECAUSE OF THE DEGREE OF RISK, STRESS AND PAIN INVOLVED

THE DEFENDANTS ARE FULLY AWARE OF THE GUIDELINES FOR HUMAN EXPERIMENTATION ESTABLISHED BY HEW AND OTHER FEDERAL AGENCIES, FDA REGULATION PROHIBITED ANY TYPE OF EXPERIMENTATION ON PRISONERS. THE DEFENDANT WAS VERY KNOWLEDGEABLE OF THEIR ACTS.

2. THE PLAINTIFF IS A RESIDENT PRISONER OF THE STATE OF ILLINOIS AND THE DEFENDANTS THE UNITED STATES PUBLIC HEALTH SERVICE, HAS CONSENTED TO THIS ACTION WITH ITS PRINCIPAL PLACE OF BUSINESS IN THE STATE OF MARYLAND.

3. THE JURISDICTION OF THIS COURT IS BASED ON CONSENT FROM THE UNITED STATES AGENCY AND DIVERSITY OF CITIZEN SHIP, AND THE AMOUNT OF

CONTROVERSY EXCEEDS THE SUM OF 10,000.00 EXCLUSIVE OF INTEREST AND COST.

4. AT ALL TIMES HERE IN MENTIONED THE DEFENDANTS WAS [sic] ENGAGED IN HUMAN EXPERIMENTATION AT THE STATEVILLE CORRECTIONAL CENTER, CONDUCTING RESEARCH ON THE SPREAD OF INFECTIOUS DISEASES.

5. AS THE DIRECT AND PROXIMATE RESULT OF THE CARELESS AND NEGLIGENCE OF THE DEFENDANTS BY PURPOSELY EXPOS ING [sic] PLAINTIFF TO INFECTIOUS DISEASES, THE DEFENDANTS NEGLIGENTLY FAILED TO WARN INSTRUCT,ADQUATE [sic] WARN THE PLAINTIFF CONCERNING THE LONG TERM EFFECTS OF EXPOSURE TO THE INFECTIOUS DISEASES.

COUNT 2.

1. THE PLAINTIFF WILLIAM MC'NEIL FOR HIS SECOND CAUSE OF ACTION REPEATS AND REAVERS THE ALLEGATIONS OF PARAGRAPHS 1,2,3,4 AND 4 OF COUNTS I AS WRITTEN AND SET FORTH HEREIN.

UNPROFESSIONAL CONDUCT, THE DEFENDANT WAS CLEARLY KNOWLEDGABLE [sic] OF THE LEGAL AND ETHICAL CONCEPTS FOR HUMAN RESEARCH, THIS LEGAL PROBLEM WAS RESOLVED BY DRAWING A LINE BETWEEN WHAT IS THERAPEUTIC AND NOW THERAPEUTIC RESEARCH BY IMAGINING THIS PLAINTIFF ASKING DOCTOR' ARE YOU EXPOSING ME TO THIS VIRUS FOR ME? OR AM I DOING THIS FOR YOU? IT IS CLEAR IF THE PLAin TIFF) [sic] IS

UNDERGOING A PARTICULAR MEDICAL PROCEDURE NOT FOR HIS OWN BENEFIT BUT FOR THAT OF THE RESEARCH IN THE PURSUIT OF A SCIENTIFIC GOAL. THEN THE RESEARCH PROCEDURE WAS NON THERAPEUTIC, THEREFORE THE EXPOSURE TO THE VIRIS [sic] WAS CLEARLY UNPROFESSIONAL CONDUCT BY THE DEFENDANTS.

COUNT 3.

THE PLAINTIFF WILLIAM MC'NEIL FOR HIS THIRD CAUSES OF ACTION REPEATS AND REVERS THE ALLEGATION OF PARAGRAPHS 1,2,3, AND 4 OF COUNT 1 AS IF EXPRESSLY REWRITTEN AND SET FORTH HEREIN. FRAUD AND DECEIT, IN THE PRACTICE OF MEDICINE BY THE DEFENDANTS, THE LEGAL AND ETHICAL CONCEPT NOW GOVERNING ANY TYPE OF EXPERIMENTATION WITH HUMAN SUBJECTS THERE FORE [sic] THE DEFENDANTS DUTY WAS TO PROTECT PLAINTIFF FROM ANY TYPE OF EXPERIMENT, THE EXPERIMENTATION HERE IN MENTIONED INVOLVED GREAT RISK, THE DEFENDANTS ARE OBSERVING THE SPREAD OF THE DEADLY VIRUS A.I.D.S. AMONG THE PRISONERS WAS INJECTED AS CONTROLLER AND OR DIOGNOSTIC [sic] CARRIERS, IT WAS THE DUTY OF DEFENDANTS TO AT LEAST MAKE SURE THAT EACH PRISONER WAS TOTALLY AWARE OF BEING A VOLUNTEER IN THIS EXPERIMENTATI ON [sic] IT WAS THE DEFENDANTS DUTY TO SUFFICIENTLY INFORMED [sic] THE PRISONER OF THE DANGER OF THIS EXPOSURE AND INFORMED CONSENT FOR THE USE OF THEIR BODIES AND OR ENVIROMENT [sic], AND THIS EXPERIMENT IS NOT THE TREATMENT OF

DIOGNOSIS [sic] OF THE PLAINTIFF OWN CONDITION AT THE START OF THIS EXPERIMENT, LEGALLY THE PRINCIPAL THAT PLAINTIFF SHOULD NOT BE USED IN EXPERIMENTS UNRELATED TO HIS PERSONAL TREATMENT UNLESS PLAINTIFF HAS GIVEN HIS INFORMED CONSENT, THE DEFENDANTS KNEW BY LAW THAT A SUBJECT HAS THE RIGHT TO KNOW HE IS BEING ASKED TO VOLUNTEER OR REFUSE TO PARTICIPATED [sic] IN A EXPERIMENT FOR ANY REASON INTELLIGENT OR OTHERWISE WELL-INFORMED, A PHYSICIAN HAS NOT LEGAL RIGHT TO WITH HOLD FROM PROSPECTIVE VOLUNTEERS TO TAKE THIS RIGHT AWAY FROM THE PLAINTIFF IN THE DESIGN OF THE EXPERIMENT IS CLEARLY A CASE OF FRAUD AND DECIET [sic] IN THE PRACTICE OF MEDICINE THIS EXPERIMENT HAS CLEARLY IMPARED [sic] PLAINTIFF LIFE AND HIS ABILITY TO LEAD A NORMAL LIFE HAS BEEN ADVERSLY [sic] AFFECTED BECAUSE OF THIS EXPERIMENT, PLAINTIFF HAS BEEN FORCED TO EXCEPT CELL-MATE WITH A.I.D.S. AND STILL BEING FORCED. WHEREFORE THE BLAINTIFF [sic] PRAYS JUDGMENT AGAINST THE DEFENDANT UNITED STATES PUBLIC HEALTH SERVICE IN THE SUM OF 20,000,000,000 twenty million dollers [sic]. TOGETHER WITH THE COST AND INTEREST OF THIS ACTION.

PLAINTIFFCLAIMS
TRIAL
BY JURY . . .

RESPECTFULLY SUBMITTED

/s/ WILLIAM MC'NEIL
P.O. BOX 112
JOLIET ILLINOIS 60434

(Logo)
DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service
Food and Drug Administration
Rockville MD 20857

In reply refer to: FOI# F88-35196

February 9, 1989

William McNeil
Attn: William McNeil
P.O. Box 112
Juliet, IL 60434

Concerning your request (copy enclosed) for record(s) from the Food and Drug Administration pursuant to the Freedom of Information Act:

___ The requested record(s) are enclosed.

___ Partial response. Further response will be made.

_X_ To the best of my knowledge, the document(s) requested are not in our files.

___ As you will note, minor deletions of material have been made in the record(s) furnished to you. In the judgment of the Food and Drug Administration the information deleted does not fall within the scope of your request and, in any case, is not required to be disclosed under the Freedom of Information Act.

___ See enclosed comments.

___ Charges will be included in a monthly invoice from the Freedom of Information Staff if your request(s) total more than $10.00 per month; the material is free if your request(s) total less than $10.00 per month. Current rates are:

Reproduction, 10 cents per page _0_ pages

Search Services, $20.00 per hour ___ hours

Sincerely yours,

/s/ Nancy Oleksa
Nancy Oleksa
Freedom of Information Officer
Office of Health Affairs

Enclosures

August 7, 1989

Clerk's Attention:

Honorable James H. Alesia
219 South Dearborn Street
Chicago, Illinois 60604

Re: 89-C-1822

Dear Honorable Sir:

Attached to this letter is a copy of the *Sum Certain*, denied by defendant. This is the second permission from P.H.S. which allows the plaintiff Willaim [sic] McNiel [sic] to file a tort claim against the defendant Public Health Services.

Plaintiff was exposed and infected with hepatitis B and, also, exposed to AIDS with a possible infection as a result of plaintiff being forced to participate in a study funded by the United States Public Health Services and for the Center for Disease Control.

Also the filing fee for this case was paid for by plaintiff, $120.00 (Check number, #79516; and court clerk's receipt number, 280045).

However, under the circumstances that exist here at Stateville Correctional Center, it's clearly impossible to file proper motions; therefore, plaintiff prays this Honorable Court accepts this letter as a proper request, whereas plaintiff can properly commence his legal action accordingly.

Respectfully submitted:

/s/ William McNeil
William McNeil
No. A-25209
P.O. Box 112
Joliet, Illinois 60434

DATED: August 7, 1989.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of the General Counsel
Washington, D.C. 20201

July 21, 1989

CERTIFIED – RETURN
RECEIPT REQUESTED

William McNeil, A-25209
P.O. Box 112
Joliet, Illinois 60434

Re: Administrative Tort Claim of William McNeil

Dear Mr. McNeil:

Transmitted herewith is the Administrative Determination on your claim presented to the Department of Health and Human Services on July 7, 1989.

Please be advised that this letter with enclosure constitutes the notice of final determination as required by 28 U.S.C. § 2401(b).

Sincerely,

/s/ Timothy M. White
Timothy M. White, Chief
Litigation Branch
Business and Administrative
Law Division

Enclosure

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of the General Counsel
Washington, D.C. 20201

July 21, 1989

CERTIFIED – RETURN
RECEIPT REQUESTED

Re: Administrative Tort Claim of William McNeil

Date of incident: September, 1987
Date of claim: July 7, 1989
Amount of claim: $500,000.00

ADMINISTRATIVE DETERMINATION

William McNeil, A-25209, P.O. Box 112, Joliet, Illinois 60434, filed an administrative claim under the Federal Tort Claims Act (28 U.S.C. § 2671. *et seq.*) alleging that he was infected with hepatitis and exposed to AIDS as a result of his participation in a study funded by the Center of Disease Control.

The Federal Tort Claims Act authorizes the settlement of any claim for money damages against the United States for injury caused by the negligent or wrongful act or omission of any employee of the Federal Government while acting within the scope of employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The administrative claim of William McNeil is hereby denied. The record contains no evidence of a negligent of wrongful act of a federal employee.

If claimant is dissatisfied with the determination he is entitled to:

1. request reconsideration based on newly discovered evidence, not previously discoverable, pursuant to Department of Justice Regulations (28 C.F.R. § 14.9) within six (6) months from the date of mailing of this determination, or

2. file suit against the United States in the appropriate federal district court within six (6) months from the date of mailing of this determination (28 U.S.C. § 2401(b)).

In the event claimant requests reconsideration, the agency will have six months from the date the request is received to reconsider. If the reconsidered claim is denied claimant may file suit within six months from the date of mailing the final determination.

/s/ Timothy M. White
Timothy M. White, Chief
Litigation Branch
Business and Administrative
Law Division

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted In Printing)

ANSWER

Defendant, by its attorney, FRED L. FOREMAN, United States Attorney for the Northern District of Illinois respectfully responds to plaintiff's Complaint as follows:

Count I

1. Defendant denies the allegations contained in paragraph 1, except admits that plaintiff is a prisoner in the Stateville Correctional Center, Illinois. Defendant states that plaintiff voluntarily participated in a study on the prevalence of HTLV-III LAV and HBV among male inmates, but the study created no risk of disease transmission inasmuch as a separate, sterile needle was used to extract blood from individual inmates.

2. Defendant admits that plaintiff is a resident prisoner of the State of Illinois, and denies the remainder of the allegations contained in paragraph 2 of the Complaint.

3. This paragraph contains plaintiff's statement of jurisdiction to which no response is necessary; to the extent a response is deemed necessary, defendant denies.

4. Defendant denies the allegations contained in paragraph 4 and states that the United States Public Health Service, Center of Disease Control, funded a study

on the prevalence of HTLV-III LAV and HBV among male inmates which was conducted by the Illinois Department of Corrections.

5. Defendant denies the allegations contained in paragraph 5 of the Complaint.

Count 2

1. In response to the first sentence in this paragraph, defendant repeats and reavers its response to paragraphs 1, 2, 3, and 4 of Count One. Defendant denies the remainder of the paragraph.

Count 3

1. In response to the first sentence of this unnumbered paragraph defendant repeats and reavers its response to paragraphs 1, 2, 3, and 4 of the Count One. Defendant denies the remainder of the paragraph.

Defenses

1. The court lacks subject matter jurisdiction over this claim.

2. The complaint fails to state a claim upon which relief may be granted.

3. Plaintiff's requested damages exceed the damages requested in his administrative claim.

4. The injuries and/or damages alleged in the Complaint were not proximately caused by a negligent or

wrongful act or omission of an employee of the United States.

Plaintiff's prayer for relief requires no response; to the extent a response is deemed necessary, defendant denies. Defendant also states that plaintiff is not entitled to a trial by jury under the Federal Tort Claim Act.

WHEREFORE, having fully answered, defendant prays that this action be dismissed and the Court grant such other and further relief as may be appropriate.

Respectfully submitted,

FRED L. FOREMAN
UNITED STATES ATTORNEY

By: /s/ Eileen M. Marutsky
EILEEN M. MARUTSKY
Assistant U.S. Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-1998

(Logo)
DEPARTMENT OF HEALTH & HUMAN SERVICES
Office of the Secretary

Office of the General Counsel
Food and Drug Division
Rockville, MD 20857

January 24, 1989

William McNeil
REG. A25209
P. O. Box 112
Joliet, Illinois 60434

Re: F88-35196

Dear Mr. McNeil:

I am sending your January 17 letter requesting damages to Arthur Simon, the PHS claims officer. It will be treated as an administrative claim. If it is denied, you will have to file a lawsuit.

Sincerely yours,

/s/ Thomas Scarlett
Thomas Scarlett
Chief Counsel

cc: Arthur Simon (w/enclosure)
HFI-35 (Deighton, see FOIA letter)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM McNEIL, Plaintiff,	)	
v.	)	No. 89 C 1822
UNITED STATES PUBLIC HEALTH SERVICE, Defendant.	)	JUDGE JAMES H. ALESIA

MEMORANDUM OPINION AND ORDER

William McNeil brings this action seeking damages against the United States Public Health Service ("the government") under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671, et seq. ("the FTCA"). The pro se complaint charges the government with conducting experiments on prisoners at the Stateville Correctional Center without first obtaining permission from the prisoners. The experiments allegedly were designed to study the spread of infectious diseases among inmates. McNeil asserts he was exposed to AIDS as a result of the experiments and the government's negligence. He requests twenty million dollars in damages. The government has moved to dismiss the complaint for lack of subject matter jurisdiction. For the reasons that follow, the court grants the motion.

The government's motion is based on two limitations periods contained in the FTCA. The first statute, 28 U.S.C. § 2401(b), governs the time for commencing an FTCA suit. It provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

The second statute, 28 U.S.C. § 2675(a), imposes a requirement that the claimant exhaust his administrative remedies before commencing suit under the FTCA. It states, in pertinent part:

> An action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within the six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. . . .

The effect of these statutes is to require a claimant to file an administrative claim before commencing suit under the FTCA. The administrative claim must be filed within two years of the time the claim accrued. If the claim is denied, the claimant has six additional months to file his FTCA suit. If the agency does not act on the claim within six months, the claimant has the option of commencing suit without a final disposition of his administrative claim.

McNeil presented his FTCA case to the court on March 6, 1989. A motion for leave to file in forma pauperis accompanied the complaint. The court ordered ruling on the in forma pauperis motion held in abeyance on June 12, 1989. Only July 7, 1989, McNeil filed his administrative claim with the Department of Health and Human Services. The administrative claim was denied in a letter dated July 21, 1989. The letter notified McNeil that he had six months to file an FTCA suit. Meanwhile, the complaint McNeil had sent to the court in March got lost in the crush of prisoner litigation filed in this district. On April 15, 1990, McNeil paid the filing fee and his complaint was formally filed.

Citing the date McNeil paid the filing fee, the government's motion to dismiss argues that the court lacks jurisdiction over McNeil's claim because he filed the suit more than six months after the denial of his administrative claim. In his responsive brief, McNeil contests the date the government relies on for the filing date of this case. He urges that he commenced suit on March 6, 1989, the day the Clerk assigned it a docket number. The government, in reply, notes that this alternative date does not cure the jurisdictional defect. McNeil did not file his administrative claim until July 1989. The government maintains that if the court accepts McNeil's argument that the March 1989 date is the proper date of filing, it still must dismiss the action, not because McNeil filed his FTCA suit tardily, but rather because he commenced it prematurely.

The first issue the court must decide then is the date of filing for purposes of determining the limitations period. The answer to this question is found in *Smith-Bey*

v. Hospital Administrator, 841 F.2d 751 (7th Cir. 1988). The court there noted "the generally accepted rule that a complaint is deemed 'filed' within the meaning of Fed.R.Civ.P. 3 for purposes of invoking the court's jurisdiction over an action when it is placed in the custody of the district court clerk." *Id.* at 757 n.5. Thus, the operative date of filing in this case is not the day McNeil paid the filing fee, but rather the day he lodged his complaint with the court and filed his motion asking for leave to file without prepayment of the filing fee. In short, McNeil commenced his suit on March 6, 1989.

The federal court has no jurisdiction to entertain a FTCA suit commenced before satisfaction of the administrative exhaustion requirement under § 2675(a). *Charlton v. United States,* 743 F.2d 557, 558-59 (7th Cir. 1984); *Erxleben v. United States,* 668 F.2d 268, 270-71 (7th Cir. 1981). In light of the statutory restrictions Congress has placed on judicial authority to hear FTCA claims against the United States, courts consistently have dismissed for lack of jurisdiction suits brought either without prior attempt to file an administrative claim, *e.g., Best Bearings Co. v. United States,* 463 F.2d 1177 (7th Cir. 1972), or after expiration of the six-month period an agency is allotted to make a final determination on an administrative damage claim. *E.g., Charlton, supra.* Between these two extremes, however, lies a third category of cases, a category into which McNeil's case falls. Although McNeil's case was premature at the time of filing, he had exhausted his administrative remedies by the time the government filed its motion to dismiss. The courts have split on their treatment of cases where plaintiff has exhausted his administrative remedies during the pendency of the FTCA suit.

In *Celestine v. Veterans Administration Hospital*, 746 F.2d 1360 (8th Cir. 1984), the Eighth Circuit permitted an FTCA suit to proceed even though plaintiff had not filed his administrative claim prior to commencing his complaint in federal court. The government moved to dismiss the complaint for lack of jurisdiction soon after it was filed. The district court, however, did not rule on the motion until eighteen months later. In the meantime, unbeknownst to the court, the plaintiff had filed for and been denied relief by the appropriate administrative agency. The Eighth Circuit reversed dismissal of the action, holding that the requirements of § 2675(a) were met if the plaintiff had exhausted his administrative remedies before "any substantial progress had been made on the case." *Id.* at 1363. Citing *Kubrick v. United States*, 581 F.2d 1092 (3d Cir. 1978), *rev'd on other grounds*, 444 U.S. 111 (1979), the court reasoned that it would be a waste of effort to dismiss the case and require refiling when it was clear that the plaintiff had exhausted his remedies at the time of the district court's decision. *Id.* Contrary to the position of the Eighth and Third Circuits, the Fifth Circuit has refused to construe § 2675(a) to allow courts to accept jurisdiction over suits filed before expiration of the six-month waiting period. In *Reynolds v. United States*, 748 F.2d 291 (5th Cir. 1984), plaintiff had filed her FTCA complaint four months after she had filed her administrative claim. Although the administrative agency had denied the plaintiff's claim by the time the district court dismissed her suit, the Fifth Circuit held that this was not enough to save the action from dismissal for lack of jurisdiction. "[S]uits against the government under the

FTCA must be filed in strict compliance with its provisions." *Id.* at 292. The FTCA mandates exhaustion of administrative remedies as a jurisdictional predicate to the filing of suit under the FTCA. Thus, for jurisdiction to exist, it must exist at the time of filing. Because plaintiff had not received a final determination of her administrative claim at the time she filed her suit, *Reynolds* concluded that the district court lacked subject matter jurisdiction at the outset, a defect that could not be cured by a subsequent exhaustion of administrative remedies. *Id.*

The equities may weigh in favor of McNeil, but the court finds itself persuaded by the reasoning of the Fifth Circuit. Moreover, although it has not spoken directly to the issue, the Seventh Circuit generally has opted for strict construction of jurisdictional requirements of the FTCA. As it explained in *Charlton*, 743 F.2d at 558, "[t]he Federal Tort Claims Act is a congressional waiver of sovereign immunity, and a plaintiff's failure to comply with the requirements of the Act leave the plaintiff with no forum for his or her claim." Statutory conditions limiting the terms of the government's consent to be sued as sovereign must be strictly construed. *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979). The conditions cannot be waived. *Erxleben*, 668 F.2d at 271. Nor are they subject to the same equitable considerations that might apply in litigation between private parties. *Houston v. United States Postal Service*, 823 F.2d 896, 902 (5th Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). McNeil did not comply with the condition that he exhaust his administrative remedies prior to bringing this action. While dismissal at this time effectively will leave him without any means to pursue

his claim against the government further, this court cannot overlook the effect of his premature filing.

In *Cooper v. United States*, 442 F.2d 908 (7th Cir. 1971), a plaintiff filed an FTCA suit four months after he had filed an administrative claim for damages with the Attorney General of the United States. Although the court affirmed dismissal on grounds that plaintiff had commenced the suit more than two years after his claim accrued, it also indicated that the court could properly have dismissed the suit for failure to exhaust administrative remedies since plaintiff had jumped the gun in filing his suit before the mandatory six-month period had elapsed. *Id.* at 911. The court remarked that limitations periods conditioning a waiver of sovereign immunity should be liberally construed in favor of repose. *Id.* at 191. If under *Cooper* it is proper to dismiss a FTCA action brought only four months after the filing of an administrative claim, it follows that a FTCA complaint filed in federal court before the administrative claims is even filed must also be dismissed.

Accordingly, finding that it lacks subject matter jurisdiction, the court grants the government's motion and directs the clerk to enter judgment dismissing this case in its entirety.

/s/ James H. Alesia
JAMES H. ALESIA
United States District Judge

Dated: JAN 24 1991

United States District Court
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

William McNeil

v.

United States Public Health Service

CASE NUMBER: 89 C 1822

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury as rendered its verdict.

X Decision by Court. This action came to ~~trial or~~ hearing before the court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court finds that it lacks subject matter jurisdiction over this action. The defendant United States Public Health Service's motion to dismiss is granted, and the clerk is directed to enter judgment dismissing this case in its entirety.

January 24, 1991
Date

H. STUART CUNNINGHAM
Clerk

United States Court of Appeals,
Seventh Circuit.

William McNEIL, Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 91-1303.

Argued April 27, 1992.

Decided May 20, 1992.

As Amended May 26, 1992.

Rehearing and Rehearing En Banc
Denied June 26, 1992.

Before CUMMINGS, EASTERBROOK, and RIPPLE, Circuit Judges.

EASTERBROOK, Circuit Judge.

William McNeil is a prisoner of Illinois. In March 1989 he filed this action under the Federal Tort Claims Act, contending that the prison had compelled him to participate in experiments conducted or financed by the United States Public Health Service. One of these experiments, McNeil alleged, was to share a cell with another prisoner who has AIDS. He demanded $20 million in damages.

Among the suit's problems was McNeil's failure to pursue administrative remedies as the FTCA requires. 28 U.S.C. § 2675(a). McNeil filed a claim in June, seeking $500,000 on the assertion that he had contracted hepatitis and been exposed to AIDS. The Department of Health and Human Services denied this claim on July 21, 1989.

Instead of commencing a new suit, McNeil sought assistance in the existing one, attaching the administrative decision to a request filed in August 1989 for the appointment of counsel. The district judge eventually dismissed the action on the ground that it had been filed too soon. It is too late to file another.

According to 28 U.S.C. § 2401(b), a tort claim against the United States must be "begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented." The administrative denial was mailed on July 21, 1989, so McNeil had between then and January 21, 1990, to begin his action. The complaint filed in March 1989 was too early. This left two options. Perhaps the document filed in March 1989 loitered on the docket, springing into force when the agency acted. Or perhaps the request for counsel in August 1989, during the six-month period, marks the real "beginning" of the action. The district court rejected both options, and McNeil, with the assistance of counsel appointed by this court, renews the arguments here.

Two courts of appeals have held that when "the administrative claim is denied before any substantial progress has been made in the pending litigation, the suit need not be refiled to be effective. . . . To hold that refiling was necessary would involve duplicitous pleadings and wasted effort." *Kubrick v. United States*, 581 F.2d 1092, 1098 (3d Cir.1978), reversed on other grounds, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). Accord, *Celestine v. Veterans Administration*, 746 F.2d 1360, 1363 (8th Cir.1984). One circuit has gone the other way. *Gregory v. Mitchell*, 634 F.2d 199, 204 (5th Cir.1981); *Reynolds v.*

United States, 748 F.2d 291 (5th Cir.1984); *United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301, 1306-07 (5th Cir.1987). Make that two: we join the fifth circuit.

Neither the third nor the eighth circuit discussed the language of § 2675(a): "An action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing" or six months have passed without decision. This statute does not authorize suits or postpone adjudication of suits; it forbids the institution of suits prior to the administrative decision. Judges of two circuits believe that Congress erred in writing a prohibition, but that does not explain why the statute Congress actually enacted may be disregarded.

Many statutes have a structure similar to § 2675(a), most prominently the environmental laws. *Hallstrom v. Tillamook County*, 493 U.S. 20, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989), considers a typical provision, in the Resource Conservation and Recovery Act of 1976: "No action may be commenced . . . prior to 60 days after the plaintiff has given notice of the violation" to various persons. 42 U.S.C. § 6972(b)(1). Some courts read this language just as the third and eighth circuits treat § 2675(a): The plaintiff may file the suit any time, but the litigation must remain inactive on the docket during the 60 days reserved for negotiation. The Supreme Court disagreed, holding that "[n]o action may be commenced" means that "[n]o action may be *commenced*" not that "[n]o action may be *prosecuted*". Section 2675(a) is no less insistent that "[a]n action shall not be *instituted*" before the administrative

action (or six months of administrative inaction). *Hallstrom* observes that negotiation may be more effective if there is not already a lawsuit on file, that observation is no less true of the FTCA than of the RCRA. And § 2675(a), as a condition on access to the Treasury, is a prime candidate for literal interpretation, see *Kubrick*, 444 U.S. at 117-18, 100 S.Ct. at 356-57, more so than fetters on litigation against persons despoiling the environment. *Hallstrom* ordains the interpretation of § 2675(a).

March 1959 was too early. The suit did not linger, awaiting administrative action. Unless McNeil began a fresh suit within six months after July 21, 1989, he loses. The only candidate is the collection of materials filed in August 1989: a letter protesting conditions in the prison and implicitly requesting counsel, an "Affidavit in Support of Motion for Appointment of Counsel" (although there was no motion), a statement of the balance in McNeil's prison trust account ($2,117.61), and a copy of the administrative decision plus a cover letter from the agency. McNeil's lawyer contends that the complaint of March was not begun until these documents "perfected" the filing. Yet Fed.R.Civ.P. 3 says that "[a] civil action is commenced by filing a complaint with the court." A complaint, not a request for a lawyer, begins the action. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984). McNeil's contention that the set of documents "perfected" the action repackages his submission that the suit lingered, awaiting activation by the administrative action. This variation meets the fate of the theme.

Only if the letter was itself a complaint does the submission satisfy the statute. *Baldwin County Welcome*

Center holds that the combination of a request for counsel plus an administrative decision (there, a letter from the EEOC giving the person the right to file suit under Title VII of the Civil Rights Act of 1964) does not satisfy Fed.R.Civ.P. 8 and hence is not a complaint. By contrast, a letter narrating the facts and making a claim for relief may be a complaint. *Pearson v. Gatto*, 933 F.2d 521, 526-27 (7th Cir.1991). Where does McNeil's letter fall on this spectrum? We need not decide, for McNeil did not characterize the letter as a complaint in the district court (where he represented himself) or here (where a professor of the Loyola School of Law is serving as his counsel). Whatever scope the doctrine may have in civil litigation, see *Deppe v. Tripp*, 863 F.2d 1356 (7th Cir.1988), it was not plain error in light of *Baldwin County Welcome Center* to treat this document as what it purported to be – a request to get on with a pending case, rather than a new complaint. *Baldwin County Welcome Center* holds that a person who receives a notice from an agency telling him exactly what to do (file a complaint) has no equitable claim to lenient treatment when he chooses to do something else. Just so here.

AFFIRMED.

RIPPLE, Circuit Judge, dissenting.

In my view, we need not resolve in this appeal the difficult issue of whether a Federal Tort Claims Act suit must be refiled when the administrative claim is denied before any substantial progress has been made in the pending litigation. That issue has divided the courts of appeals and certainly deserves resolution by the Supreme Court of the United States. The Court took note of the

issue in 1979 but explicitly declined to resolve it. *See United States v. Kubrick*, 444 U.S. 111, 115 n. 4, 100 S.Ct. 352, 356 n. 4, 62 L.Ed.2d 259 (1979).

Here, it is clear that the plaintiff, a prisoner proceeding pro se, attempted to refile the action after the denial of the administrative claim. On August 7, 1989, he wrote to the district court. His letter sets forth the gravemen of his complaint against the Public Health Service, asks the court to accept "this letter as a proper request, whereas plaintiff can properly *commence* his legal action accordingly." (Emphasis supplied). Under the circuit's holding in *Pearson v. Gatto*, 933 F.2d 521, 526-27 (7th Cir.1991), this letter serves as an adequate complaint.[1]

ORDER

Plaintiff-Appellant filed a petition for rehearing and suggestion of rehearing en banc on May 28, 1992. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED. Judge Flaum did not participate in the consideration or decision of this case.

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[1] I respectfully differ with my colleagues as to whether Mr. McNeil raised this issue adequately in this court. *See* Appellant's Br. at 7. The government shares my view. *See* Supplemental Government Br. at 4. Nor, given the standards of pleading to which we hold incarcerated pro se litigants, do I believe that the characterization of the document as a complaint was "waived" in the district court. Mr. McNeil made one point clear to the district court in August 1989: despite the difficulties of filing papers with the court from Stateville Correctional Center, he was attempting to "commence his legal action."

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: May 20, 1992

BEFORE: **Honorable** Walter J. Cummings, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge

No. 91-1303

WILLIAM MCNEIL,
Plaintiff – Appellant

v.

UNITED STATES OF AMERICA
Defendant – Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 89 C 1822, Judge James H. Alesia

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is **AFFIRMED,** with costs, in accordance with the decision of this court entered this date.

Supreme Court of the United States

No. 92-6033

William McNeil,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of the petitioner must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., March 1, 1993. The brief of the respondent must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., March 31, 1993. A reply brief, if any, must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., April 12, 1993. Rule 29 does not apply. The case is set for oral argument during the Session beginning April 19, 1993.

January 15, 1993